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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 824

CLARENCE CISIN, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner, Clarence Cisin, prays that a Writ of Certiorari issue to review the final order of the United States Court of Claims of November 15, 1963, whereby the claim filed by Petitioner was dismissed in that court.

THE OPINION BELOW

The opinion of the United States Court of Claims (R. 49) printed on page 6a of the Appendix to this Petition of November 15, 1963, was unreported.

JURISDICTION

The judgment of the United States Court of Claims was entered on November 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1255.

QUESTIONS PRESENTED

1. Does the Court of Claims have jurisdiction under 28 U.S.C. Section 1491, and accordingly does the six-year statute of limitations for such court under 28 U.S.C. Section 2501 commence to run before the claimant has accrued a claim for money?

2. Does a new claim accrue before the United States Court of Claims based upon an arbitrary and capricious decision of a board for the correction of military records (established by 10 U.S.C. Sec. 1552) wherein the events which would have justified the correction took place more than six years prior to the filing of a petition in the Court of Claims, but the final decision of the correction board was made within six year of such filing?

3. Should the statute of limitations against a claim be invoked by the United States Government wherein it advises such claimants in writing with their application form blanks of the availability of non-lawyer counsel to aid in prosecuting their claims and the claimant has so obtained a non-lawyer to represent him?

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix A annexed hereto, pages 1a-5a. They are: Sections 402(b), 402(d), and 403 of Title IV of the Career Compensation Act of 1949; United States Code, Title 10, Section 1552, and United States Code, Title 28, Sections 1491 and 2501.

STATEMENT OF THE CASE

The jurisdiction of the Court of Claims was invoked under United States Code, Title 28, Section 1491, by the institution of a claim in such court for retired pay as a Commander, United States Naval Reserve. The court dismissed the claim on the ground that it was barred by the statute of limitations. However, the real issue involved is a jurisdictional one—that is, when did the claim of Petitioner first become cognizable by the Court of Claims.

The Petitioner served on active duty in World War I, returned to active duty in World War II, and continued to serve in such status until *separated* for a 20 per cent physical disability with severance pay pursuant to Title IV of the Career Compensation Act of 1949, on June 4, 1954. (R. 2)

If the Petitioner's disability had been rated at 30 per cent instead of 20 per cent, he would have been *retired* for physical disability with retired pay and there is no dispute but that he had at least an additional 10 per cent disability due to an unrated wrist injury at the time he was separated. (R. 19) But there is a dispute as to when the wrist injury took place. The Bureau of Medicine and Surgery of the Navy has persistently indicated that the occurrence was in 1923 while Petitioner was a civilian in view of the statement contained in the Petitioner's medical record to such effect. (R. 9, 10, 19, 20) On the other hand, the Petitioner has disavowed the accuracy of such statement and has alleged the injury was incurred during a period of service during World War I. (R. 2, 3)

But irrespective of the time of the occurrence of the disabil[illegible] (as long as it was before the Petitioner

entered his service during the Second World War), the Navy did not rate such disabilities when the Petitioner was severed because of an erroneous and subsequently repudiated interpretation of the law by the Office of the Judge Advocate General of the Navy that it could not rate disabilities incurred in a prior period of service. (R. 3, 4, 6)

In 1955, the Petitioner filed an application with the Board for the Correction of Naval Records and to such Board, over a period of time, submitted evidence showing the occurrence of his wrist disability during active duty during World War I by a nurse who had then witnessed it, evidence that such disability was aggravated during World War II, a statement from the President of the Physical Evaluation Board which acted on the case that such Board would have rated the Petitioner's wrist disability at 10 per cent except for the subsequently repudiated opinion of the Judge Advocate General, a photograph taken in 1921 showing Petitioner wearing a wrist band on the affected wrist, and evidence that the Petitioner was suffering from cancer of the skin in places where he was noted to have seborrheic keratoses and angiomas while on active duty. (R. 7-10, 14-27)

Despite this formidable array of evidence, the Board for Correction of Naval Records consistently refused to correct the Petitioner's record to show that he was retired instead of separated by reason of physical disability. It is manifest that the basis for the action by the Board was written opinions on the case by the Chief, Bureau of Medicine and Surgery. (R. 10)

The Board for Correction of Naval Records specifically announces the availability of non-lawyer repre-

sentation by Service Organizations such as the American Legion, DAV, VFW, etc. in cases before it and Petitioner was so represented, at least until an adverse decision by such Board in August of 1960. (R. 6, 7)

The Petition in this case was filed before the Court of Claims July 12, 1962. (R. 1) This was eight years after his separation. But until approximately January 1, 1957, the Petitioner had no *money claim* at the Court of Claims, since the disability severance pay which he had previously received exceeded his accrued entitlement to disability retirement pay until such date. (R. 11)

This is to say, if the Court of Claims had jurisdiction and the case had been brought and decided before January 1, 1957, the Petitioner would have collected no money at that time from the Government pursuant to his claim, but rather would have owed the Government money, and if he had died previous to this date, presumably his estate would have been liable for the amounts owed.

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. A Conflict Exists Between the Decision as to Which Review Is Sought and a Prior Decision Rendered By This Court

The statute concerning the time for filing suit in the United States Court of Claims, 28 U.S.C. 2501, provides that "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

This Court had occasion to consider what comprises claims over which the Court of Claims has jurisdiction

in the case of *United States* v. *Alire*, 1868, 73 U.S. [6 Wall.] 573, [App. C]. In such case, this Court stated on pages 575 and 576:

> It will be seen by reference to the two Acts of Congress on this subject, that the only judgments which the Court of Claims are authorized to render against the government, or over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, *are judgments for money* found due from the government to the petitioner. And, although it is true that the subject matter over which jurisdiction is conferred, both in the act of 1855, and of 1863, would admit of a more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up *a moneyed demand as due from the government*. [Emphasis added]

Under United States Code, Title 28, Sec. 1491, the jurisdiction of the Court of Claims is essentially the same as it was at the time of *United States* v. *Alire*; that is, "to render judgment upon any claim against the United States".

The Court of Claims has previously adhered to this rule. Accordingly, we have the following from opinions:

> It has been determined by the Supreme Court and this court, and is in fact elementary, that a right of action accrues and the statute of limitations begins to run when and only when, the period of credit has expired; or, in other words, when an account is due and payable, or when there is a breach of contract. *Smith Courtney Co.* v. *U.S.*, 1944, 46 C. Cls. 262, 265, 266.

> The statute of limitations which is jurisdictional in this court—*United States* v. *Wardwell*, 172 U.S. 48, 52—begins to run when a suit may first be brought under our jurisdictional act. *Rice* v. *United States*, 122 U.S. 611, 617. *American Ship Fitting Corp.* v. *U. S.*, 1930, 70 C. Cls. 679, 688, 689.
>
> Pursuant to 28 U.S.C. Sec. 2501, an action in the Court of Claims must be brought within six years of the date of its accural. Within the meaning of that section an action first accrues on the date when all events have occurred which fixed the liability, if any, of the United States and upon which date a potential claimant becomes entitled to sue thereon. *Levine* v. *U.S.*, 1956, 133 C. Cls. 774, 779, 780.
>
> A course of action of whatever nature can accrue only at the time that a suit may be maintained thereon, and from that date forward the applicable statute of limitations begins to run. *Cannon* v. *U.S.*, 1956, 137 C. Cls. 104, 107.
>
> This court has consistently held that a claim first accrued on the date when all events have occurred which fix the liability, if any, of the United States and entitles the claimant to sue thereon. *Empire Institute of Tailoring, Inc.* v. *United States*, 1958, 142 C. Cls. 165, 167.

It is important to note that in the instant case, the question of whether Petitioner would receive severance pay or disability retirement pay depended upon his percentage of disability. If it were less than 30 per cent, he receives severance pay, but if it were 30 per cent or more he receives retirement pay. Title IV of the Career Compensation Act of 1949 authorizes these benefits in the alternative and *in no event could Petitioner receive both.*

For the Petitioner to have a money claim against the United States, he had to do at least one thing. That was to live until January 1, 1957. Until then, he had no claim cognizable by the Court of Claims.

It is submitted that the Court of Claims has broadened its jurisdiction beyond that granted by statute and as set forth in *U. S.* v. *Alire*.

The Court of Claims has, in effect, held that a claimant in the position of the Petitioner is entitled to sue even though he does not have a claim for money at the time he brings suit.[1] Alternatively, it has eliminated the right to sue as requisite to commence the running of the statute of limitations.

It is urged that this is more than a conflict in the application of the rules of law, but rather is a conflict in principle both with the statutory jurisdiction of the Court of Claims and the prior holding by this Court in *U. S.* v. *Alire*.

2. The Court of Claims Is Arbitrary in Refusing to Accept Jurisdiction in a Claim Against the United States Founded Upon the Arbitrary and Capricious Action of the Board for the Correction of Naval Records

In the decisions of *Frank E. Lipp* v. *The United States*, Ct. Cls. No. 384-58, decided April 4, 1962; 301 F. 2d 674, *cert. den.*, 373 U.S. 932 and *Betty Friedman, Executrix of the Estate of Joseph Friedman, deceased*,

[1] Because the Petitioner served in World War I and accordingly is entitled to receive a full 75 per cent retired pay, his money claim first accrued within the six years following his separation. However, had he been entitled to be placed upon the permanent retired list with only 30 per cent retired pay, he would not have had a claim for money until six and two-thirds years from his separation.

v. *The United States*, C. Cls. No. 377-60, decided Nov. 7, 1962, 310 F. 2d 381; *cert. den.*, 373 U.S. 932, the Court of Claims has taken the position that since the correction board actions are not a prerequisite for its jurisdiction—not being administrative remedies which must first be exhausted—action before a correction board does not toll the statute of limitations under 28 U. S. Code, Sec. 2501. Accordingly, where a claim would otherwise be barred by the statute of limitations, the Court of Claims will not entertain jurisdiction to determine whether the Correction Board action is arbitrary and capricious.

It is submitted that this is an erroneous interpretation, since a new cause of action must necessarily arise when the Correction Board has been arbitrary and capricious under United States Code, Title 10, Sec. 1552. In the instant case, although a hearing is provided for in the regulations, it is obvious that the Board for Correction of Naval Records, which by the legislation must be composed of "civilians", abrogated its functions to the Chief, Bureau of Medicine and Surgery, a uniformed naval officer, even though it was shown that the basis for such officer's opinion was error beyond peradventure.[2]

This action by the Court of Claims is in conflict with the holdings of this Court to the effect that an administrative order which is based upon a finding not supported by substantial evidence must be set aside

[2] The basis for the opinion of the Chief, Bureau of Medicine and Surgery, was a *medical entry* to the effect that the petitioner injured his wrist in 1923. In rebuttal, an eye witness was found who helped treat petitioner's injury during World War I, and a photograph taken in 1921 was produced showing that the petitioner was wearing a wrist band at the time.

as arbitrary. *The Chicago Junction case*, 1924, 264 U.S. 258, 265; *Alabama* v. *United States*, 1945, 325 U.S. 535. To hold that an action by a statutory board is not reviewable because it involves events which preceded the actions of the board is indeed a novel holding which unnecessarily limits the jurisdiction of the Court of Claims and should be extinguished by this Court.

3. The Peculiar Construction Given to the Statute of Limitations by the United States Court of Claims Is Particularly Odious in That the Correction Boards Actually Advise Applicants Before Them on the Back of the Application Forms of the Availability of Non-Lawyer Counsel to Aid Them in Prosecuting Their Claims

In this case, the Petitioner was originally represented by a representative from the Veterans of Foreign Wars who has not a lawyer. Such representation is afforded as a benefit the Veterans of Foreign Wars organization holds out to various claimants, and the availability of such an organization to represent applicants is set forth on the back of the instruction sheet given to applicants for the preparation of their applications. However, such representation is usually non-lawyer representation and was so in this case.

The VFW representative in this case made requests for consideration by The Board for Correction of Naval Records for the submission of additional evidence, and protested the referral of the case to the Chief, Bureau of Medicine and Surgery until March 31, 1960. At that date, even under the construction given by the Court of Claims to the statute of limitations, an action could have been seasonably filed on behalf of the Petitioner. However, the request for

reconsideration was denied on August 29, 1960, which is more than six years after the Petitioner had been separated. Throughout this period, the Petitioner was without the representation of an attorney who was a member of the bar.

Certainly, denial of the assistance of qualified counsel in an administrative proceeding is a denial of due process. Can, then, this be avoided by merely "recommending" non-lawyer representation?

It is earnestly solicited that the circumstances point to an effective denial of administrative due process by not only the procedures employed before the Correction Board, but also by the encouragement to the applicant to seek and utilize non-lawyer assistance. If the statute of limitations has run it is to be seen that the hands of the Respondent are not entirely clean and it is submitted that the Respondent should not be permitted to invoke the statute of limitations under such circumstances.

CONCLUSION

It is urged that the holding of the Court of Claims in this case necessarily enlarges its jurisdiction in finding that a right to sue the United States is considered to exist at a time when there was in fact no monetary claim, and, on the other hand, the holding has unduly restricted its jurisdiction by refusing to recognize a claim under an act of Congress which was properly raised by the Petition—under circumstances where at the administrative level due process was denied to the Petitioner. Not only have the Petitioner's rights been seriously breached by the Government and the decision of the Court of Claims, but in doing so the Court of

Claims has been in direct conflict with a prior decision of this Court. Accordingly, for the reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Title IV of the Career Compensation Act of 1949, 63 Stat. 816—Provisions Relating to Retirement, Retirement Pay, Separation, and Severance Pay for Physical Disability.

* * *

Sec. 402. (b) Upon a determination by the Secretary concerned (1) that a member of a Regular component of the uniformed services entitled to receive basic pay, or a member of a Reserve component of the uniformed services entitled to receive basic pay who has been called or ordered to extended active duty for a period in excess of thirty days, is unfit to perform the duties of his office, rank, grade, or rating, by reason of physical disability incurred while entitled to receive basic pay; (2) that such disability is not due to the intentional misconduct or wilful neglect of such member and that such disability was not incurred during a period of unauthorized absence of such member; (3) that such disability is 30 per centum or more in accordance with the standard schedule of rating disabilities in current use by the Veterans' Administration; (4) that such member has completed at least eight years of active service as defined in section 412 of this title; and (5) that accepted medical principles indicate that such disability may be of a permanent nature, the name of such member shall be placed upon the temporary disability retired list of his service by the Secretary concerned and such members shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section: *Provided*, That if condition (5) above is met by a finding that such disability is of a permanent nature, such member may be retired by the Secretary concerned and, upon retirement, shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section: *Provided further*, That if condition (3) above is not met because

the disability is determined to be less than 30 per centum, the number concerned shall not be eligible for any disability retirement provided in this section, but may be separated for physical disability from the service concerned and upon separation shall be entitled to receive disability severance pay as prescribed in section 403 of this title: . . .

* * * * *

Sec. 402 (d) A member of the uniformed services whose name is placed upon the temporary disability retired list of his service pursuant to subsections (a), (b), or (c) of this section, for the period during which his name is carried on such temporary disability retired list, but in no event to exceed a period of five years, or a member of the uniformed services who is retired pursuant to the provisions of this title, shall be entitled to receive disability retirement pay computed, at his election, by multiplying an amount equal to the monthly basic pay of the rank, grade, or rating held by him at the time of the placement of his name on the temporary disability retired list or at the time of his retirement, whichever is earlier, by (1) a number equal to the number of years of active service to which such member is entitled under the provisions of section 412 of this title, multiplied by 2½ per centum, or (2) the percentage of his physical disability as of the time his name was placed on the temporary disability retired list or at the time of retirement, whichever is earlier: *Provided*, That for the purpose of the computation of (1) above, fractions of one-half year or more of active service shall be counted as a whole year: . . .

* * * * *

Sec. 403. A member of the uniformed services separated for physical disability pursuant to the provisions of section 402 of this title shall be entitled to receive disability severance pay computed as follows: An amount equal to two months' basic pay of the rank, grade, or rating held by such member at the time of the placement of his name

on the temporary disability retired list or at the time of his separation, whichever is earlier, and which such member would be entitled to receive at the time of separation if serving on active duty in such rank, grade, or rating, multiplied by a number equal to the number of years of active service to which such member is entitled under the provisions of section 412 of this title but not to exceed a total of two years' basic pay: *Provided*, That for the purpose of this computation, fractions of one-half year or more of active service shall be counted as a whole year: . . .

United States Code, Title 10, Section 1552:

Sec. 1552. Correction of military records: Claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary bene-

fits, or for the repayemnt of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled

under the laws and regulations administered by the Administrator of Veterans' Affairs.

(f) The Secretary of Defense for the military departments, and the Secretary of the Treasury for the Coast Guard, shall report to Congress every six months on claims paid under this section during the period covered by the report. The report shall include for each claim the name of the claimant, a brief description of the claim, and a statement of the amount paid.

United States Code, Title 28, Section 1491

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * *

United States Code, Title 28, Section 2501

Sec. 2501. Time for filing suit

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

APPENDIX B

Opinion and Judgment Below

IN THE UNITED STATES COURT OF CLAIMS

No. 234-62

CLARENCE CISIN

v.

THE UNITED STATES

ORDER

This case comes before the court on defendant's motion to dismiss the petition filed on February 21, 1963. Upon consideration thereof, together with plaintiff's response, oral argument of counsel and the briefs of the parties, it is concluded that plaintiff's alleged claim is barred by the statute of limitations, 28 U.S.C. § 2501, and

IT IS ORDERED this 15th day of November, 1963, that defendant's motion be and the same is granted, and plaintiff's petition is dismissed.

BY THE COURT,

MARVIN JONES,
Chief Judge.

APPENDIX C

Opinion in United States v. Alire, 1868, 73 [6 Wall.] 573

UNITED STATES v. ALIRE.

A case in the Court of Claims which involves the right of a claimant to a military bounty land warrant under the acts of Congress of March 3d, 1855, and May 14th, 1856, which claim had been rejected by the commissioner of pensions, and the rejection confirmed by the Secretary of the Interior, is apparently within that part of the fifth section of the act of March 3d, 1863, which provides "that

when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the government in the adjustment of such class of cases, . . . and such facts shall be certified to by the presiding justice of the Court of Claims, the Supreme Court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy."

Accordingly, an appeal from a judgment of the Court of Claims in such a case, where there had been no special allowance, and which had been dismissed by this court, because not a judgment for money and over $3000, was, on motion of the United States, reinstated, and the record remanded to the Court of Claims for such further proceedings as might seem fit and proper in the cause as it respected the appeal prayed for.

APPEAL from the Court of Claims.

Julian Alire filed a petition in that court setting forth that under the acts of Congress of March 3d, 1855, and of May 14th, 1856, he had made application to the commissioner of pensions for one hundred and sixty acres of bounty land, and had conformed to the provisions of the said acts, and the rules and regulations of the pension office; that the application was rejected by the commissioner, and that, on appeal to the Secretary of the Interior, the rejection had been confirmed. Issue was taken in the Court of Claims on this petition, and the cause having been afterwards heard before it, a decree was rendered in favor of the petitioner for a bounty land warrant, to be made and delivered to him by the proper officer. It was also further ordered that the decree should be certified by the clerk of the court, under its seal, and remitted to the Secretary of the Department of the Interior.

From this decree the United States appealed, on the ground among others that the court below had no jurisdic-

tion of the case. The soundness of this view depended, of course, on statutes organizing or regulating that court.

The first act* organizing the court was passed February 24th, 1855, and the jurisdiction conferred was "to hear and determine all claims founded upon *any law of Congress*, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed thereto, and also all claims which may be referred to said court by either house of Congress."†

The court was directed to keep a record of their proceedings, and, at the commencement of each session of Congress, and of each month during the session, report to Congress the cases upon which the court had fully acted, stating in each the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which it is founded. The court were also directed to prepare a bill in the cases determined favorably, in such form as, if enacted, will carry the same into effect.

The next act relating to the organization of the court was passed March 3d, 1863.‡

The second section of this act conferred substantially the same jurisdiction as to cases before the court as in the first section of the previous act; but jurisdiction, in addition, was conferred over set-offs, counter-claims, &c., &c., on the part of the government against the petitioner.

The fifth section provided, that either party might appeal to the Supreme Court of the United States from any final judgment or decree which might thereafter be rendered in the Court of Claims, *wherein the amount in controversy exceeded three thousand dollars.*

* 10 Stat. at Large, 612, § 1.

† § 5.

‡ 12 Stat. at Large, 765.

The seventh section, that in all cases of final judgment by said court, or on appeal by the Supreme Court, where the same was affirmed in favor of the claimant, the *sum* due thereby shall be paid out of any general appropriation made by law for the payment of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, &c. And in cases where the judgment appealed from is in favor of said claimant, or the same is affirmed by the Supreme Court, *interest* at the rate of five per cent *shall be allowed* from the date of its presentation to the Secretary of the Treasury for payment, but *no interest* shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid, with a proviso that *no interest* shall be allowed on any claim up to the time of the rendition of the judgment by said Court of Claims, unless on a contract expressly stipulating for interest.

The thirteenth section enacted that all laws, and parts of laws, inconsistent with the provisions of this act, were thereby repealed.

Mr. Norton, solicitor for the Court of Claims, contended that the fifth and seventh sections of the act of 1863 showed that the Court of Claims could give no judgments against the United States for anything but money.

Messrs. Hughes, Denvers, and Peck, with Mr. Watts (by brief filed), argued, contra, that the jurisdiction was, by the previous act of 1855, expressly given where the claim was founded on any act of Congress; and that confessedly the claim was here so founded.

Mr. Justice NELSON delivered the opinion of the court.

The only question presented in the record, which we shall examine, is whether or not the court below had jurisdiction of the cause.

It will be seen by reference to the two acts of Congress on this subject, that the only judgments which the Court of

Claims are authorized to render against the government, or over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, are judgments for money found due from the government to the petitioner. And, although it is true that the subject-matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the government.

This view is confirmed by the judgment of this court in the case of *Gordon, Adm'r*, v. *United States*,* in which the court denied any jurisdiction over the case on account of the power of the executive department over its judgment by the fourteenth section of the act of 1863. That section was repealed by the first section of the act of March 17th, 1866.

The decree, or judgment, in the present case is, that the claimant recover of the government a military land warrant for one hundred and sixty acres of land, and that it be made out and delivered to the said Julian Alire by the proper officer, and the decree to be certified and remitted to the Secretary of the Interior. We find no provision in any of the statutes requiring a judgment of this character, whether in this court or in the Court of Claims, to be obeyed or satisfied. Nor does either court possess any authority to render such a judgment, as is apparent from a perusal of the seventh section of the act of 1863, and which is the only one providing for the rendition of a judgment or decree in any case before the court below.

Even if the first section of the act of 1855 and the second of 1863 could be construed as giving a jurisdiction in cases

* 2 Wallace, 561; 1 Court of Claims Reports, 83; Acts establishing the Court of Claims.

other than money demands against the government, no judgment could be rendered by the court below, and, of consequence, the carrying into effect their finding must depend on the act of 1855. But we are of opinion that it was intended by the several provisions of the act of 1863 that the cases to be heard were to pass into a judgment as prescribed in the seventh section of the latter act, and hence they must be such in their nature and character as may admit of a judgment or decree in conformity with its provisions.

Our conclusion is, the court below had no jurisdiction of this case, and that the decree must be reversed, and the cause remanded to the court with directions to enter a decree dismissing the petition.

NOTE.

A motion was subsequently made on the part of the United States to reinstate on the docket this cause, dismissed as above stated at this term on the ground that it did not appear that the amount in controversy exceeded $3000), and to remand it to the Court of Claims with a view to an amended or special appeal under the fifth section of the act of March 3d, 1863,* which provides "that when the judgment or decree will affect a class of cases or furnish a precedent for the future action of any executive department of the government in the adjustment of such class of cases, . . . and such facts shall be certified to by the presiding justice of the Court of Claims the Supreme Court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy."

Mr. Justice NELSON delivered the opinion of the court.

The case involves the right of the claimant to a military bounty land warrant under the acts of Congress passed March 3d, 1855, and May 14th, 1856, which claim had been

* 12 Stat. at Large, 765 6.

rejected by the commissioner of pensions, and the rejection confirmed by the Secretary of the Interior. The case would seem to fall within the provision providing for a special appeal on behalf of the government. We see no valid objection to the motion, and therefore direct the cause to be reinstated on the docket, and the record remanded back to the Court of Claims for such further proceedings as may seem fit and proper in the cause as it respects the appeal prayed for.

Remanded Accordingly

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 824

CLARENCE CISIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 6a) is not reported.

JURISDICTION

The judgment of the Court of Claims dismissing petitioner's claim was entered on November 15, 1963. The petition for a writ of certiorari was filed on February 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly ruled that petitioner's claims for military disability retirement pay were barred by the statute of limitations (28 U.S.C. 2501) because the suit was filed more than six years after a Physical Evaluation Board determination that petitioner was unfit for service by reason of physical disability.

STATUTE INVOLVED

Title 28 of the United States Code, Section 2501, provides in pertinent part:

> Time for Filing Suit:
>
> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, within six years after such claim first accrues.

STATEMENT

Petitioner served on active duty as an officer in the United States Navy from March 20, 1918, to September 30, 1921, when his commission was terminated. He was recalled for active duty on September 22, 1942, and served continuously until 1954. On April 26, 1954, he appeared before a Physical Evaluation Board which found two service-connected disabilities, degenerative disc disease and meralgia. The combined rating of these disabilities was found to be twenty per cent. A third disability, arthritis of the right wrist, was not rated because it was found that this disability was not incurred while petitioner was

entitled to receive basic pay. These findings were concurred in by the Physical Review Council and approved by the Secretary of the Navy on May 10, 1954. On June 4, 1954, petitioner was honorably discharged by reason of physical disability, with severance pay of $12,449.80. In 1955 petitioner filed an application for review with the Navy Board of Correction, together with evidence that indicated that his right wrist was injured while he was on active duty. That application was denied, as were subsequent applications for reconsideration.

On July 12, 1962, petitioner brought this action for military disability retirement pay. On the government's motion to dismiss, the court held that petitioner's claim was barred by the statute of limitations and dismissed the petition (Pet. App. 6a).

ARGUMENT

This Court has recently denied certiorari to review Court of Claims decisions presenting the same issue raised by the present petition. *Lipp* v. *United States*, 301 F. 2d 674 (Ct. Cls.), certiorari denied, 373 U.S. 932; *Friedman* v. *United States*, 310 F. 2d 381 (Ct. Cls.), certiorari denied, 373 U.S. 932. Adhering to its decision in those cases, the Court of Claims has once again held that a claim for military disability retirement pay accrues upon the final action of a Retiring Board. That ruling does not conflict with the decisions of this or any other court. Accordingly, no question meriting review by this Court is presented.

1. The prior decisions of the Court of Claims make it clear that petitioner's claim is barred by the statute of limitations, 28 U.S.C. 2501. In *Friedman* v. *United States*, *supra*, the Court of Claims canvassed its previous decisions in military disability pay cases and clearly delineated the application of 28 U.S.C. 2501 to each category of such claims. The court there summarized the limitations rule as follows (310 F. 2d at 395-96):

> Summary: As our discussion has shown, the main course of the court's decisions on the time-bar in the disability retirement field reveals a well-structured design:
>
> (a). The judicial claim for disability retirement pay does not accrue on release from active duty but rather on *final* action of a board competent to pass upon eligibility for disability retirement (or upon refusal of a request for such a board).
>
> (b). Normally, the Retiring Board is the proper board, but where the claimant has not had or sought a Retiring Board, his claim does not accrue until final action by the Correction Board (which in that instance stands in the place of the Retiring Board as the proper tribunal to determine eligibility for disability retirement).
>
> (c). A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality.
>
> (d). Once a final decision is had, the claim accrues, the limitations period begins to run, and

there is no tolling of the statute by reason of further applications to other boards or agencies (including the Correction Board).

(e). Once a final decision is had, adverse determinations by other boards, including the Correction Board, do not give rise to a new cause of action.

(f). A claim for entitlement to disability retirement status and pay—of the type requiring discretionary action by a board and the Secretary—is not a "continuing claim" but accrues as a whole (once it accrues). However, other types of pay claims not dependent on a board finding—including claims for increased retirement pay because of new legislation, etc.—are "continuing" claims.

Contrary to petitioner's assertions (Pet. 8-10), teh Court of Claims decision in *Friedman* is both correct and dispositive of petitioner's claims. It is based upon "the normal rule" that "where a proper administrative tribunal has denied or refused to consider a claim and further administrative remedies are permissive not mandatory . . . the judicial cause of action arises immediately upon the initial tribunal's action and does not start again upon a subsequent administrative decision affirming that holding." 310 F. 2d at 396. Speaking for the court, Judge Davis rejected the argument that, after a Disability Review Board has denied a claim, a judicial cause of action is created by a subsequent denial of the same claim by a Correction Board (310 F. 2d at 600-01):

> * * * it is unusual to have two or more causes of action stemming from the same events or transactions, but arising at wholly different times. Theoretically, it would not be impossible for Congress to make such provision, but in the absence of some definite legislative indication to that effect it is preferable to follow the normal principle that out of one set of facts and circumstances involving the claimant's separation from service there arises but one claim for the same kind of relief (money, in the case of disability retirement pay claims). This is all the more true since our limitations statute is phrased in terms of the "*first*" accrual of the claim. 28 U.S.C. § 2501. The legislative emphasis on *first* accrual cautions against multiplication of monetary claims successively arising out of essentially the same facts.

Here petitioner's claim was determined by the Physical Evaluation Board and the Disability Review Council in 1954. It was then that his claim "first accrue[d]" within the meaning of 28 U.S.C. 2501. This suit was filed more than eight years later.

2. Petitioner's attempt to avoid the force of *Friedman* is ineffectual. Plainly, there is no merit in the argument (Pet. 5-8) that he could institute no suit against the United States in the Court of Claims until his disability retirement pay claim accrued to an amount exceeding the severance pay which he had received ($12,449.80)—and which he would be required to refund if he prevailed. For, even though a favorable judgment rendered at that time might immediately produce no net monetary recovery, it would

obviously qualify as a "money judgment," fixing the government's liability for accrued disability retirement pay (and, as a practical matter, for future payments), while at the same time requiring petitioner to refund the severance pay already received.

Equally without merit is petitioner's argument (Pet. 10-11) that the Government's failure to provide legal counsel to assist all claimants at every step of the proceedings before the Board of Correction of Naval Records is a denial of due process. Cf. 5 U.S.C. 1005 (a). Petitioner was afforded the right to be represented by counsel of his own choosing. There is no statute authorizing, nor has due process ever been deemed to require, appointment of counsel in non-criminal administrative proceedings. In any event, petitioner does not allege that a request for the appointment of counsel was ever made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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MARCH, 1961.

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PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 824

CLARENCE CISIN, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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IN THE

Supreme Court of the United States

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CLARENCE CISIN, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

The Brief for the United States in Opposition completely overlooks *United States* v. *Alire*, 1868, 73 U.S. [6 Wall.] 573[1] wherein this Court concurred in the proposition *then* contended by the Government that the Court of Claims could give no judgments against the United States for anything but money.

Instead, Respondent sets up the case of *Friedman* v. *United States*, C. Cls. 1962, 310 F. 2d 381, *cert. den.*, 373 U.S. 932, as dispositive of the instant case, and argues that *Friedman* cannot be avoided because "even

[1] Although this contrary decision was the first reason advanced by Petitioner for granting his Petition, the Respondent completely ignores the decision and makes no effort to distinguish it in any manner.

though a favorable judgment at that time [the time the United States contends Petitioner's claim first accrued] might immediately produce no net recovery, it would obviously qualify as a 'money judgment', fixing the Government's liability for accrued disability retirement pay (and, as a practical matter, for future payments), while at the same time requiring petitioner to refund the severance pay already received."

Suffice it to say that *Friedman* does not involve the issue of when a money claim arises within the jurisdiction of the United States Court of Claims where an individual is erroneously paid a lump sum severance pay in lieu of retired pay. In fact, *Friedman* does not discuss the question of what constitutes a "money claim" at all.

In contrast, *U. S.* v. *Alire*, *supra*, holds that a money claim *is* necessary to the jurisdiction of the Court of Claims. Accordingly, the remarkable theory which the Respondent is now attempting to foist upon this Court is that a money claim accrues to an individual at a time when there is no money due for him to claim. And, moreover, at a time when, if anything, he has been overpaid and there is at best only a possibility that a money claim will ever ripen in his favor—depending upon uncertainties such as the continued life of both the individual and the statute under which he might someday have a claim for retired pay.

In reference to Petitioner's *second* point involving the question of whether a claim accrues with an arbitrary and capricious action by the Board for Correction of Naval Records, the Respondent has first quoted on pages 4 and 5 of its brief a summary of the limita-

tion rules set forth in *Friedman* v. *United States*, *supra*. Next, on page 5, the Respondent noted that the Court of Claims had in such case rejected the argument that after a *Disability Review Board* has denied a claim, a judicial cause of action is created by a subsequent denial of the same claim by a Correction Board. Then on page 6, the Government asserts that "petitioner's claim was determined by the Physical Evaluation Board and the *Disability Review Council* in 1954." [Emphasis added]

The *Disability Review Board* is a statutory board established under the Servicemen's Readjustment Act of 1944, as amended, 58 Stat. 287; 59 Stat. 623. Such board has never acted on Petitioner's case, nor did it ever have jurisdiction to do so. Also no *Disability Review Council* acted on Petitioner's case in 1954 or at any other time.[2] The *Physical Evaluation Board*, a non-statutory board, *recommended* findings in petitioner's case—the final *determinations* being exercised by the Secretary of the Navy under Section 402(b) of the Career Compensation Act of 1949 [P. App. p. 1a].

The Respondent, accordingly, seems confused as to the facts in this case. So confused, it appears to be contending that under *Friedman* v. *U. S.*, *supra*, Petitioner's claim accrued with the erroneous findings recommended by a non-statutory board and the action

[2] Perhaps the Respondent meant the "Physical Review Council" which is an administrative Council wherein heads of various Navy bureaus and offices or their representatives individually review actions of Physical Evaluation Boards prior to Secretarial action thereon. However, this action is not a final determination. Most certainly, the "Disability Review Board" referred to in the *Friedman* decision never acted on the case as one might inadvertently infer from a quick reading of Respondent's brief.

of a non-existent council, and with such the limitations period began to run.

The simple fact of the matter is that the Petitioner sought to correct an error and injustice for the first time through the statutory Board for Correction of Naval Records and his application was arbitrarily refused. Before the cases of *Friedman* v. *U. S.*, *supra*, and *Lipp* v. *U. S.*, C. Cls. 1962, 301 F. 2d 674, *cert. den.*, 373 U.S. 932, it was generally assumed that an application arbitrarily dismissed by a Correction Board created a new claim, insofar as a moneyed demand was concerned, at the Court of Claims. The *Lipp* and *Friedman* decisions changed this—erroneously the Petitioner believes—and attempted to set out in a comprehensive manner the rule pertaining to the Statute of Limitations in the Court of Claims.[3]

Confusion on the part of the Respondent is somewhat understandable if it is also recognized that the Petitioner's case does *not* fit into any of the summarizations set forth in *Friedman* v. *U. S.*, *supra*, [U.S. Brief, pp. 4-5], unless it be the second sentence of the summary designated (f), whereby Petitioner's claim would be considered a "continuing claim," and as such should not have been dismissed.

The confusion in the Brief of the United States continues wherein on page 7, Petitioner is indicated to

[3] The Court's attention is invited to the circumstance that *Friedman* v. *U.S.*, *supra*, seems also to constitute a judicial repeal of Section 205 of the Soldiers' and Sailors' Civil Relief Act, as amended, 54 Stat. 1181, 56 Stat. 770, USC Title 50, App. Sec. 525, which provides for the exclusion of periods of military service from all limitations actions.

have argued "that the Government's failure to provide legal counsel to assist all claimants at every step of proceedings before the Board of Correction of Naval Records is a denial of due process."

In no way has the Petitioner complained of the Government's failure to provide legal counsel. To the contrary, the complaint is that the Correction Board encouraged the Petitioner in writing to obtain non-lawyer counsel and then delayed acting on a request for reconsideration made by a counsel so obtained for a period of approximately five months, during which the Petitioner became barred from remedial action under the construction of the Statute of Limitations as applied by the Government.

It is respectfully submitted that failure of the United States to meet Petitioner's reasons for the granting of a petition in this case constitutes a tacit admission as to the validity of same.

Respectfully submitted,

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